Filed 3/29/10 P. v. Mateuz CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ALEXANDER MATEUZ, Defendant and Appellant.	B210698 (Los Angeles County Super. Ct. No. BA309786)

APPEAL from a judgment of the Superior Court of Los Angeles County. Frederick N. Wapner, Judge. Affirmed as modified with directions.

Valerie G. Wass, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Paul M. Roadarmel, Jr., and Daniel C. Chang, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Alexander Mateuz (appellant) of assault with a firearm on Ronald Cabrera (Cabrera) (Pen. Code, § 245, subd. (a)(2))[1] (count 1); two counts of unlawful firearm activity (§ 12021, subd. (e)) (counts 3, 7); and three counts of assault with a semiautomatic firearm upon three different victims: Blanca Arias (Arias), Elio Reyes (Reyes), and Jonathan Lozano (Lozano) (§ 245, subd. (b)) (counts 5, 6, 8). The jury found that appellant personally used a firearm in the commission of counts 1, 5, 6, and 8 in violation of section 12022.5, subdivision (a). The jury found true the gang allegations charged in counts 1, 3, and 8. (§ 186.22, subd. (b)(1)(B).) Appellant admitted that he had suffered three prior convictions or juvenile adjudications for serious or violent felonies. (§ 1170.12, subds. (a)–(d); 667, subds. (b)–(i).)

After denying appellant's *Romero* motion,[2] the trial court sentenced appellant to a total term of 63 years to life. In count 8,[3] the trial court imposed 25 years to life, five years for the gang enhancement, and the midterm of four years for the firearm enhancement, for a total of 34 years in that count. In count 1, the trial court imposed a concurrent term of 25 years to life, five years for the gang enhancement, and four years for the firearm enhancement. In count 3, the trial court imposed a concurrent term of 25 years to life. In count 5, the trial court imposed a consecutive term of 25 years to life, a midterm of four years for the firearm enhancement, and a stayed five-year gang enhancement, for a total of 29 years in that count. In count 6, the trial court imposed a concurrent term of 25 years to life, four years for the firearm enhancement, and a stayed gang enhancement. In count 7, the trial court imposed a concurrent term of 25 years to life.

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1 All further statutory references are to the Penal Code unless otherwise indicated.

2 *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497 (*Romero*).

3 The trial court mistakenly named count 7, but was clearly referring to the assault upon victim Lozano, which was count 8, and the court later corrected itself.

Appellant appeals on the grounds that: (1) the true findings on the criminal street gang enhancements in counts 1, 3, and 8 must be reversed because the evidence failed to establish that one of the statutorily enumerated offenses was a primary activity of the Black Diamond gang; and (2) the trial court should be ordered to prepare an amended abstract of judgment and nunc pro tunc minute order of the probation and sentencing hearing so that they accurately reflect the jury verdicts and the judgment.

FACTS

Prosecution Evidence

Lozano lived on Rosewood Avenue in Los Angeles in 2006. On the evening of September 22, 2006, his friend Cabrera came to his apartment and spoke with him while standing just outside Lozano's door. Appellant and his codefendant, Daniel Vanegas (Vanegas), ran up the stairs to Lozano's door and began asking Lozano and Cabrera if they were from the MS-13 gang. Appellant and Vanegas both had black guns that looked like nine-millimeter guns. Appellant pointed his gun at Lozano's head, and Vanegas pointed his at Cabrera's face. Lozano knew appellant as Dopey, although he did not know him personally. He had seen him cruising in his black SUV. Lozano knew Vanegas as Emko.

Appellant kept "dissing" MS-13 by calling them "monkey shits." Appellant said "this is Black Diamonds' neighborhood." Lozano was in shock and said nothing. Vanegas kept telling Cabrera to go, and Cabrera left. Vanegas then punched Lozano, who fell to the ground. Appellant began kicking him. Appellant wanted Lozano to "go outside," but Lozano refused.

Cabrera remembered appellant pointing a silver gun at his face Appellant also pushed him. Appellant and his cohort were saying bad words, such as "Fuck monkey shit" and "Fuck you, fools." They also said "Black Diamonds gang" and looked at Lozano. Cabrera remembered Vanegas pointing a gun at Lozano, and he saw Vanegas hit Lozano. Cabrera did not call the police after he left because he was scared.

Shortly after Cabrera left, appellant and Vanegas suddenly stopped their attack on Lozano and ran back down the stairs. Lozano went inside his home and called Arias. That evening he went to visit her, and she told him to report the incident. Lozano was unsure whether he should. Lozano said at trial that he had been a member of MS-13, but he was not in 2006. His monikers were Guero and Duende.

On the following day, Lozano went with Arias to the police station. He identified appellant and Vanegas in photographic lineups (six packs). Cabrera also identified appellant and Vanegas in a six pack.

On September 23, 2006, the day after the attack on Lozano, Arias was leaving her apartment with her boyfriend, Reyes, when she saw appellant and Vanegas coming out of the building in front of hers. Appellant said "Fuck mierda." Vanegas began throwing Black Diamond gang signs. Although Reyes said nothing, Arias began yelling profanities in return. Arias had formerly socialized with MS gang members, and Reyes had been an MS gang member. Arias's husband, from whom she was separated, was an MS gang member.

Arias and Reyes got in Reyes's car with Reyes at the wheel. Appellant and Arias continued yelling at each other, and Arias "flipped" appellant. Arias and Reyes pulled out into the street and stopped. Appellant ran over to a female and pulled a silver gun from her purse and cocked it. As Reyes began pulling away, appellant fired the gun once. When Reyes speeded up, appellant fired again. The gun sounded like an automatic to Arias. The bullets did not hit the car or its passengers.

Arias called a detective immediately and gave a statement to a patrol unit a short time later. She went to the police station that afternoon. She chose appellant's and Vanegas's photographs from six packs. She had never met appellant, but she had seen him many times and knew he drove a black Explorer.

Arias went to the station a second time with Lozano. She believed Lozano had never been an MS gang member. Her relationship with him was that of a big sister or mother. Lozano lived three buildings away from her.

Officer Brent Phillips of the Los Angeles Police Department (LAPD) conducted a search of appellant's home and vehicle, a black Explorer, on September 23, 2006. In the Explorer, Officer Phillips found a black nine-millimeter handgun loaded with seven live nine-millimeter rounds. There was also a black pouch containing a stainless steel .22-caliber pistol that was loaded with seven live nine-millimeter rounds. There were additional rounds loose in the pouch.

Officer Hugo Ayon of the LAPD testified as a gang expert. He stated the Black Diamond street gang was relatively small, containing approximately 20 members, and it began in the mid-1980's. He described the boundaries of the territory they claim, their hand signs, their graffiti, and their favorite hangout—a building on Rosewood Avenue where Vanegas's family lives. He did not personally know appellant or his codefendant. Officer Ayon believed Vanegas was a member of the Black Diamond gang based on what other officers had told him, LAPD resources, and the area where Vanegas hangs out. Officer Ayon believed appellant was a member of the Black Diamond gang also. Among his tattoos, appellant has a "B" and a "D" on his shoulders and a tattoo of a prison tower with a chain link fence and a face behind the fence. Officer Ayon also based his opinion on conversations with officers who had worked the Black Diamond gang and to whom appellant had admitted his membership, as well as field interview (FI) cards documenting appellant's gang affiliation. He had spoken with officers who previously were in charge of monitoring Black Diamonds, and he specifically named these officers as Officer Dominguez and Officer Faber.

Officer Ayon was of the opinion that Lozano is a member of the MS gang. MS is a rival of the Black Diamond gang. Officer Ayon stated that Arias had at one time been an MS gang member.

Officer Ayon was given a hypothetical based on the facts of the incident involving Lozano. He believed the assault was committed in furtherance of, or for the benefit of, the Black Diamond street gang. MS is not only a rival of the Black

Diamond gang, but is also considered a threat to the Black Diamond gang's control of their area. The acts committed enhanced the reputation of the Black Diamond gang and showed they were willing to use violence to defend their neighborhood. "Monkey Shit" is a derogatory term used to "disrespect" MS, and disrespect and reputation are important to a gang member.

Officer Ayon was given a hypothetical based on the facts of the incident involving Arias and Reyes. He believed those offenses were for the benefit of the gang. The location is the heart of the Black Diamond gang's neighborhood. Having a rival gang member drive through is a form of disrespect, and it could also be seen as a threat. The gang will go to any lengths to protect that neighborhood. The discharge of a handgun serves to enhance not only the gang's reputation but the individual member's reputation. Moreover, since Rosewood Avenue is a major thoroughfare for residents of the area, the gang member shooting a weapon shows disregard for public safety.

Officer Ayon had been in the gang unit for a year at the time of trial and was testifying for the first time as a gang officer in court. He was not in the gang unit in September 2006 when the incidents occurred. He had testified as a police officer regarding gangs "a dozen or couple dozen" times.

Officer Ayon described the primary activities of the Black Diamond gang as assault with deadly weapons, robberies, vandalism, graffiti, and murder.

Defense Evidence

The defense presented no evidence.

DISCUSSION

I. Sufficiency of the Evidence in Support of the Gang Allegation

A. Appellant's Argument

Appellant contends that, although Officer Ayon had some knowledge of the Black Diamond gang, much of his testimony lacked sufficient foundation. As a result, the prosecution failed to establish that one of the Black Diamond gang's primary

activities was the commission of one or more of the crimes specified in section 186.22, subdivision (e).

B. Relevant Authority

Section 186.22, subdivision (f) provides in pertinent part that a criminal street gang "means any ongoing organization, association, or group of three or more persons, whether formal or informal, *having as one of its primary activities the commission of one or more of the criminal acts enumerated in paragraphs (1) to (25), inclusive, or (31) to (33), inclusive, of subdivision (e),* having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity." (Italics added.)

The elements of a section 186.22 gang enhancement may be proved by a combination of documentary evidence, percipient witness testimony, and expert opinion testimony. (*People v. Gardeley* (1996) 14 Cal.4th 605, 626 (*Gardeley*).) We review a section 186.22 gang enhancement finding for substantial evidence. (*People v. Williams* (2009) 170 Cal.App.4th 587, 624.) "[S]ubstantial evidence" is evidence that is "reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) We apply the same standard of review when a case relies in part on circumstantial evidence. (*People v. Lee* (1999) 20 Cal.4th 47, 58.)

Given this court's limited role on appeal, appellant bears an enormous burden in claiming there was insufficient evidence to sustain the verdicts. If a verdict is supported by substantial evidence, we are bound to give due deference to the trier of fact and not retry the case ourselves. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) It is the exclusive function of the trier of fact to assess the credibility of witnesses and draw reasonable inferences from the evidence. (*People v. Alcala* (1984) 36 Cal.3d 604, 623.)

C. Evidence Sufficient

It is settled that the primary activities element may be established through expert testimony. (*People v. Vy* (2004) 122 Cal.App.4th 1209, 1226; *People v. Duran* (2002) 97 Cal.App.4th 1448, 1465 (*Duran*); *People v. Augborne* (2002) 104 Cal.App.4th 362, 372.) "The testimony of a gang expert, founded on his or her conversations with gang members, personal investigation of crimes committed by gang members, and information obtained from colleagues in his or her own and other law enforcement agencies, may be sufficient to prove a gang's primary activities." (*Duran, supra,* at p. 1465; *People v. Sengpadychith* (2001) 26 Cal.4th 316, 324 (*Sengpadychith*).) In addition, the trier of fact may consider evidence of gang members' past or present conduct involving the commission of one or more of the crimes listed in the statute in determining the group's primary activities. (*Sengpadychith, supra,* at p. 323.) That is to say, as the jury was instructed, if the jury found appellant and his coperpetrator guilty of the charged crimes, it could consider those crimes in deciding whether one of the group's primary activities was commission of that crime. (CALCRIM No. 1401.)

We conclude there was sufficient evidence to prove the primary-activity element of the gang enhancement. "The focus of the substantial evidence test is on the *whole* record of evidence presented to the trier of fact, rather than on '"isolated bits of evidence."' [Citation.]" (*People v. Cuevas* (1995) 12 Cal.4th 252, 261.) We must presume the existence of every fact the jury could reasonably deduce from the evidence. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) The jury's guilty verdicts on the charged offenses as well as the expert testimony constituted sufficient evidence.

Officer Ayon testified that, based upon his knowledge of the Black Diamond gang and his conversations with other police officers, he believed the Black Diamond gang's primary activities included assaults with deadly weapons, robberies, vandalism, graffiti, and murder. In addition, Officer Ayon's testimony helped to establish circumstantially that the gang's primary activities included the enumerated crimes.

Officer Ayon explained that the Black Diamond gang, being such a small gang, had shown that they were willing to use violence and would go to "any and all costs" to defend their neighborhood. Officer Ayon stated that the activities between two rival gangs cause fights, shootings, and assaults because the gang members challenge each other on sight. Officer Ayon also explained that a gang member earns stripes by "put[ting] in work," which involves anything from "committing simple vandalisms up to selling narcotics, . . . committing robberies, assault with deadly weapon, shootings." (See *People v. Margarejo* (2008) 162 Cal.App.4th 102, 111 [reasonable to infer a gang member possesses a gun to assist in gang crimes].) Moreover, the evidence showed that appellant and his fellow gang member each committed gang-related crimes listed in section 186.22, subdivision (e) upon two separate victims in furtherance of the goals about which Officer Ayon testified.[4] The record thus shows that sufficient evidence supported the primary activity element.

Appellant, however, asks us to discredit Officer Ayon's testimony, arguing that his opinion about the Black Diamond gang's primary activities lacked sufficient foundation and detail. Appellant complains that Officer Ayon did not indicate how recently he had spoken to the other police officers, which departmental resources he was referring to, the dates of appellant's and Vanegas's admissions, or the dates on the FI cards. Appellant's argument is not persuasive. Officer Ayon was permitted to rely on hearsay in forming his opinion, and the record indicates that his conversations with Officers Faber and Dominguez were recent, because they were related to the events of this trial. (*People v. Pollock* (2004) 32 Cal.4th 1153, 1172 ["an expert may base an opinion on hearsay"]; *People v. Vy*, *supra*, 122 Cal.App.4th at p. 1223, fn. 9 [a gang

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4 Appellant committed assault with a firearm against Lozano and Cabrera and had unlawful possession of a firearm, crimes listed in section 186.22, subdivision (e)(1) and (31). Vanegas committed assaults with a firearm against Lozano and Cabrera. (§ 186.22, subd. (e)(1).) The jury found all these crimes were gang-related. No gang allegation was charged in the crimes against Arias and Reyes.

expert may base his testimony about the culture, habits, and primary activities of a gang on hearsay].) Officer Ayon named the departmental resource of FI cards. As for the dates of appellant's and Vanegas's admissions of gang membership, this information is not relevant to proving the element of primary activities of the gang. Just as in *Gardeley*, *supra*, 14 Cal.4th at page 620, the jury could rely on Officer Ayon's expert opinion because it was based on his conversations with other officers, gang members, and the public, as well as his review of the police resources, such as FI cards. (See *Sengpadychith*, *supra*, 26 Cal.4th at p. 324.) Also, prior to his testimony, Officer Ayon had reviewed the preliminary hearing testimony, the arrest reports, and the two crime reports. We believe Officer Ayon's experience and knowledge, which was acquired from sources approved in *Gardeley*, were sufficient to establish the foundation for his direct testimony regarding the gang's primary activities. (See *People v. Martinez* (2008) 158 Cal.App.4th 1324, 1330; *Sengpadychith*, *supra*, 26 Cal.4th at p. 324; *Gardeley*, *supra*, 14 Cal.4th at p. 620.)

Moreover, although Officer Ayon had never testified as an expert before, he had testified "a dozen or a couple of dozen" times regarding gangs and gang investigations before joining the gang unit. Nothing in the evidence suggests he """"*clearly lack[ed]* qualification as an expert.""""" (*People v. Farnam* (2002) 28 Cal.4th 107, 162.) If witnesses could not testify for the first time as experts, we would have no experts. (*McCleery v. City of Bakersfield* (1985) 170 Cal.App.3d 1059, 1066.) Furthermore, Officer Ayon had been a police officer for eight years at the time of trial and had worked in the Rampart Division for six and one-half years. He had been in the gang enforcement unit for approximately one year, and one of the gangs he monitors is the Black Diamond gang. He received a "block of instruction" in the academy regarding gangs. He attended a three-day gang school and a symposium on gangs. He had attended several seminars run by the California Gang Investigators Association. At the time of trial he had daily informal contacts with gang members on

the street. Thus, his opinion was based on the sources approved in *Gardeley*, *supra*, 14 Cal.4th at page 626.

Appellant relies heavily on *In re Alexander L.* (2007) 149 Cal.App.4th 605 (*Alexander L.*), where the reviewing court found there was an inadequate foundation for the gang expert's opinion. (*Id*. at p. 612.) In that case, Alexander was alleged to have committed vandalism by engaging in "tagg[ing]." (*Id*. at p. 609.) In support of the charged gang enhancement, an expert testified generally about the benefits a gang derived from graffiti and stated that Alexander's gang was "an active street gang" as of the date of his arrest. When asked about the gang's primary activities, the expert testified, "'I know they've committed quite a few assaults with a deadly weapon, several assaults. I know they've been involved in murders. [¶] I know they've been involved with auto thefts, auto/vehicle burglaries, felony graffiti, narcotic violations.'" (*Id*. at p. 611.) The reviewing court noted that "[n]o further questions were asked about the gang's primary activities on direct or redirect examination [¶] . . . No specifics were elicited as to the circumstances of these crimes, or where, when, or how [the expert] had obtained the information. He did not directly testify that criminal activities constituted [the gang's] primary activities, [and] on cross-examination, [the expert] testified that the vast majority of cases connected to [appellant's gang] were graffiti related." (*Id*. at pp. 611-612.) The court concluded the expert's testimony lacked an adequate foundation, since the basis for his knowledge of the gang's primary activities was never elicited. (*Ibid*.)

In this case, however, the foundation for Officer Ayon's opinion was clearly established in accordance with *Gardeley*. (*Gardeley*, *supra*, 14 Cal.4th at p. 620.) Furthermore, unlike the testimony in *Alexander L.*, Officer Ayon was directly asked, more than once, to recite the primary activities of the Black Diamond gang, and he enumerated specific crimes. Murder, robbery, assault with a deadly weapon, or attempted commission of those crimes, are all activities enumerated in the gang statute. (See § 186.22, subd. (e)(1), (2), & (3).) (See *People v. Martinez*, *supra*, 158

Cal.App.4th at p. 1330; see also *People v. Margarejo*, *supra*, 162 Cal.App.4th at pp. 102, 107–108; *People v. Ramirez* (2007) 153 Cal.App.4th 1422, 1427.)

In *People v. Perez* (2004) 118 Cal.App.4th 151, another case relied upon by appellant, the gang expert did not give an opinion about the gang's primary activities. (*Id*. at pp. 157–160.) He simply testified that gang members from defendant's gang had engaged in a beating six years prior to the charged crime and two shootings less than a week before the charged crime. (*Id*. at pp. 157, 158, 160.) We concluded that this evidence was insufficient to sustain the jury's finding on the street gang enhancement, stating, "No expert testimony such as that provided in *People v. Gardeley*, *supra*, 14 Cal.4th at page 620 was elicited here." Moreover, the "evidence of the retaliatory shootings of a few individuals over a period of less than a week, together with a beating six years earlier, was insufficient to establish that 'the group's members *consistently and repeatedly* have committed criminal activity listed in the gang statute.'" (*Id*. at p. 160.) In the instant case, as we have stated, Officer Ayon did give his expert opinion about the Black Diamond gang's primary activities. In addition, appellant and another gang member committed assaults with a firearm on two separate victims.

We conclude the record contains substantial evidence to sustain the jury's finding that the Black Diamond gang was indeed a criminal street gang having as one of its primary activities the repeated commission of enumerated offenses.

II. Error in Abstract of Judgment

A. Argument

Appellant contends that the trial court's minute order and abstract of judgment erroneously reflect that there is a firearm-use enhancement in count 3 and gang enhancements in counts 5 and 6. Appellant urges this court to order the trial court to prepare an amended abstract of judgment and a nunc pro tunc minute order that accurately sets forth the jury's verdicts and judgment.

The People agree that the four-year firearm enhancement in count 3 should be stricken, since no firearm allegation was made in that count. The People urge that the matter must be remanded for resentencing, however, since the trial court failed to either impose the gang enhancement in count 3, which the jury found true, or strike the enhancement with a statement of reasons as required by section 186.22, subdivision (g).[5]

The People also agree that no gang enhancements were alleged or found true in counts 5 and 6, and that the five-year enhancements imposed must be stricken. Therefore, remand for the limited purpose of resentencing is required. Appellant disputes that remand is necessary.

B. Proceedings Below

In imposing sentence in count 3, the trial court stated, "with regard to count 3, which is ex-con with a gun, 12021 of the Penal Code, the court again sentences him to 25 years to life concurrent to the sentence in counts 1 and 7 (the assaults on Cabrera and Lozano) because it's all the same incident, the same set of operative acts." The minute order of the hearing states, however, that a gang enhancement of five years and a firearm enhancement of four years were also imposed in count 3. There was no firearm enhancement alleged in count 3, although there was a gang enhancement alleged and found true, but not imposed.

In imposing sentence in count 5 (the assault on Arias), the trial court stated, "As to count 5, you're sentenced to 25 years to life plus the midterm of four years for the firearm use pursuant to section 12022.5. *The gang allegation of five years is imposed*

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[5] Section 186.22, subdivision (g) provides, "Notwithstanding any other law, the court may strike the additional punishment for the enhancements provided in this section or refuse to impose the minimum jail sentence for misdemeanors in an unusual case where the interests of justice would best be served, if the court specifies on the record and enters into the minutes the circumstances indicating that the interests of justice would best be served by that disposition."

and stayed pursuant to section 654 since it was imposed on the first set of counts. I think once is enough. So I think it's 29 to life, and that sentence is consecutive to the 34 to life that is in counts 1, 3 and 8." However, no gang allegation was alleged or found true in count 5.

In count 6, the trial court stated, "with regard to the sentence on count 6 as to Mr. Reyes, 25 to life plus four years for the gun. *The gang allegation is stayed*. That's concurrent to the sentence in count 5 because it's the same occasion, same set of operative facts." No gang allegation was alleged or found true in count 6.

The abstract of judgment shows the firearm-enhancement error in the count 3 sentence. With respect to the gang enhancements, we note that the abstract lists them in section No. 3, which is not the proper place for listing such enhancements. This section does not allow for an enhancement to be tied to a specific count, since this section is meant to be used only for enhancements based on prior convictions or prior prison terms. The list shows a total of five gang enhancements, two of them stayed. In fact, only three gang enhancements were found true for appellant (counts 1, 3, & 8). The trial court imposed a five-year term for the gang enhancement twice (counts 1 & 8) and failed to impose it in count 3.[6]

C. Remand Required

It is clear that the firearm enhancement must be stricken from count 3, and the gang enhancements must be stricken from counts 5 and 6. The only issue is whether remand is required because of the trial court's failure to impose the gang enhancement in count 3 during the oral pronouncement of judgment.

In this case, the trial court made clear its intentions with respect to the sentencing in counts 1, 3, and 8 and the gang enhancements. The trial court first imposed the sentence in count 8 (the assault on Lozano), where it imposed a five-year

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[6] In count 1, the five-year enhancement for the gang allegation is to run concurrently.

gang enhancement. In the next count in which a gang enhancement was alleged and found true, count 1 (the assault on Cabrera), the trial court imposed a concurrent sentence, including the term for the gang enhancement, because both offenses occurred on the same occasion. In the next and final count in which a gang enhancement was found true, count 3 (unlawful firearm activity), the trial court imposed a concurrent sentence stating that it was "because it's all the same incident, the same set of operative facts." Therefore, although the trial court inadvertently failed to impose the gang enhancement in count 3, it is clear that the trial court would have imposed the gang enhancement in that count and would have run it concurrently. We therefore modify the sentence to include this concurrent gang enhancement.

DISPOSITION

The judgment is modified in count 3 to strike the firearm enhancement (§ 12022.5, subd. (a)), as shown on the abstract of judgment and minute order, and to impose a concurrent gang enhancement (§ 186.22, subd. (b)(1)(B)), as found true by the jury. The judgment is modified in counts 5 and 6 to strike the gang enhancements (§ 186.22, subd. (b)(1)(B)), which were not alleged in those counts. The superior court is directed to amend the minute order of August 20, 2008, and the abstract of judgment to reflect the correct sentence.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
BOREN

_____, J.
CHAVEZ